

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
NATIONAL READY MIXED CONCRETE CO.,	)	FCC File No. 0001799643
Assignor	)	
	)	
MOBILE RELAY ASSOCIATES,	)	
Assignee	)	
	)	
Application for Consent to the Assignment of	)	
Licenses for Private Land Mobile Radio Stations	)	
KLH414 and KL3784, Corona, California	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 20, 2008**

**Released: March 17, 2008**

By the Commission:

1. In a February 22, 2007 *Order on Reconsideration*,<sup>1</sup> the Mobility Division (Division) of the Wireless Telecommunications Bureau (Bureau) denied a petition filed by National Science and Technology Network, Inc. (NSTN) for reconsideration of an *Order*<sup>2</sup> denying NSTN's informal petition to deny the above-captioned application to assign the licenses for private land mobile radio Stations KLH414 and KL3784, Corona, California, from National Ready Mixed Concrete Co. (NRMC) to Mobile Relay Associates (MRA). We have before us a pleading that we treat as an application for review of the *Order on Reconsideration*.<sup>3</sup> For the reasons set forth below, we deny NSTN's application for review.

2. *Background.* The above-captioned application to assign the licenses for private land mobile radio stations KLH414 and KL3784 from NRMC to MRA was filed on July 8, 2004.<sup>4</sup> NSTN filed an informal petition to dismiss or deny the application on the grounds that the subject licenses cancelled automatically due to permanent discontinuance of station operation pursuant to Section 90.157 of the Commission's Rules.<sup>5</sup> In support of its claim that station operation had been discontinued, NSTN asserted that NRMC had been NSTN's customer, paying NSTN to operate on NSTN's co-channel Station WPPZ334, Glendale, California. In opposition, MRA submitted documentation and sworn declarations from principals of NRMC and MRA attesting that the NRMC stations were in continuous operation, including the period when NRMC was a customer of NSTN, and that NRMC purchased service on

<sup>1</sup> National Ready Mixed Concrete Co., *Order on Reconsideration*, 22 FCC Rcd 3768 (WTB MD 2007) (*Order on Reconsideration*).

<sup>2</sup> National Ready Mixed Concrete Co., *Order*, 21 FCC Rcd 5151 (WTB PSCID 2006) (*Order*).

<sup>3</sup> See *infra* at paras. 6-7.

<sup>4</sup> FCC File No. 0001799643 (filed July 8, 2004, amended Aug. 17, 2004). The KLH414 license covered the base station and the KL3784 license authorized fifty associated mobile units. The mobile units subsequently were added to the KLH414 license, and the KL3784 license was terminated. See FCC File No. 00022661086 (filed June 23, 2006).

<sup>5</sup> 47 C.F.R. § 90.157.

NSTN's station to supplement, rather than replace, its own operations. In reply, NSTN disputed that NRMC maintained its own operations, provided invoices and additional information to substantiate its claims that NRMC had been its customer, and submitted a declaration from NSTN's president asserting, *inter alia*, that NSTN "routinely monitored the channel" and never heard NRMC use its own call signs in its transmissions.<sup>6</sup>

3. After MRA filed an erratum to its opposition to provide an attachment (payments by NRMC for rental of its transmitter site) that had been referenced in but inadvertently omitted from one of the declarations attached to MRA's opposition,<sup>7</sup> NSTN filed a response to the erratum in which it sought to present additional evidence regarding business dealings between NSTN and NRMC.<sup>8</sup> MRA moved to strike NSTN's response to the erratum, or in the alternative to present rebuttal evidence.<sup>9</sup> NSTN responded to MRA's motion.<sup>10</sup>

4. On May 12, 2006, the Bureau's Public Safety and Critical Infrastructure Division (PSCID)<sup>11</sup> denied NSTN's informal petition to dismiss or deny the application. PSCID declined to consider the additional information in NSTN's response to MRA's erratum, and dismissed the response and the subsequent responsive pleadings.<sup>12</sup> PSCID then concluded, based on the record before it, that NSTN had not demonstrated that the licenses for Stations KLH414 and KL3784 cancelled automatically due to permanent discontinuance of operation because it was plausible that NRMC purchased service on NSTN's co-channel station to augment its own operations,<sup>13</sup> and the monitoring mentioned by NSTN fell short of the detailed monitoring studies required by Commission precedent to substantiate permanent discontinuance of operations.<sup>14</sup> On May 16, 2006, NSTN filed a petition for reconsideration.

5. On February 22, 2007, the Division denied NSTN's petition for reconsideration. The Division accepted PSCID's decision not to consider the additional information first proffered in NSTN's response to MRA's erratum,<sup>15</sup> and affirmed the finding in the *Order* that the record did not set forth

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<sup>6</sup> See Response of National Science and Technology Network, Inc. (NSTN) to Opposition to Informal Petition to Dismiss or Deny (filed Aug. 16, 2004).

<sup>7</sup> See Mobile Relay Associates, Erratum to Opposition to Informal Petition to Dismiss or Deny (filed Aug. 17, 2004).

<sup>8</sup> See Response of National Science and Technology Network, Inc. (NSTN) to Opposition to Erratum of [sic] Opposition to Informal Petition to Dismiss or Deny (filed Aug. 30, 2004).

<sup>9</sup> See Mobile Relay Associates, Response to Improper Pleading (filed Sept. 8, 2004).

<sup>10</sup> See Reply of NSTN to "Response of MRA, dated September 8, 2004" (filed Oct. 4, 2004).

<sup>11</sup> Pursuant to a Commission reorganization effective September 25, 2006, certain duties of the Public Safety and Critical Infrastructure Division were assumed by the Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

<sup>12</sup> See *Order*, 21 FCC Rcd at 5152 n.7, 5153-54 ¶ 9. Specifically, in the exercise of its discretion with respect to review of informal objections and responsive pleadings thereto, PSCID declined to permit NSTN to introduce new factual allegations that could have been raised earlier in the proceeding. *Id.* at 5152 n.7 (citing Automobile Club of Southern California, *Order on Reconsideration*, 16 FCC Rcd 2934, 2936 ¶ 6 (WTB PSPWD 2001); Colorado RSA 7B(2) Limited Partnership, *Order*, 13 FCC Rcd 22079, 22081 n.17 (WTB CWD 1998)).

<sup>13</sup> See *id.* at 5152-53 ¶ 5.

<sup>14</sup> *Id.* at 5153 ¶ 6 (citing, e.g., Quatron Communications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 4749, 4753 ¶ 13 (2000); Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999)).

<sup>15</sup> See *Order on Reconsideration*, 22 FCC Rcd at 3770-71 & n.26 (citing, e.g., *Colorado Radio Corp. v. Federal Communications Commission*, 118 F.2d 24, 26 (D.C. Cir. 1941)). The Division rejected NSTN's argument that the *Order* had "ignored" probative evidence of discontinuance. *Id.* at 3770 ¶ 6.

persuasive evidence of discontinuance of operation.<sup>16</sup> Finally, the Division concluded that the proof of monitoring submitted by NSTN “fell far short of what is required” to demonstrate permanent discontinuance of operations.<sup>17</sup>

6. On February 28, 2007, NSTN filed a pleading identified as a petition for reconsideration of the *Order on Reconsideration*.<sup>18</sup> On March 13, 2007, MRA moved to dismiss the petition on the grounds that it was repetitious of the petition for reconsideration that was denied in the *Order on Reconsideration*.<sup>19</sup> In response, NSTN requested that its pleading be deemed an application for review, rather than a petition for reconsideration.<sup>20</sup> NSTN also requested the initiation of modification proceedings pursuant to Section 316 of the Communications Act of 1934, as amended,<sup>21</sup> with respect to the MRA licenses at issue.<sup>22</sup> MRA opposed those requests.<sup>23</sup>

7. *Discussion.* As an initial matter, we address NSTN’s requests that we treat its petition as an application for review, and that we initiate license modification proceedings with respect to the MRA licenses. Because NSTN’s petition was filed within the time for filing an application for review, and was directed to the Commission rather than the Division, we will exercise our discretion to treat it as an application for review.<sup>24</sup> We decline, however, to consider the modification request in the context of this proceeding.<sup>25</sup> Moreover, we agree with MRA’s observation that NSTN appears to seek not modification but rescission or revocation of the licenses, which is beyond the scope of Section 316.<sup>26</sup>

8. In its application for review, NSTN asserts that the Division should have concluded,

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<sup>16</sup> *Id.* at 3770 ¶ 6.

<sup>17</sup> *Id.* at 3771 ¶ 7.

<sup>18</sup> See Letter dated Feb. 28, 2007 from Ted S. Henry, President, NSTN, to Secretary, Federal Communications Commission (AFR).

<sup>19</sup> See Motion to Dismiss or, in the Alternative, Opposition to “Informal” Petition for Reconsideration (filed Mar. 13, 2007) (citing 47 C.F.R. § 1.106(k)(3)).

<sup>20</sup> See Opposition to Motion to Dismiss and Cross Motion to Consider Pleading as Application for Review Filed by National Science and Technology Network, Inc. (NSTN) and Request to Initiate Modification Proceedings Against Mobile Relay Associates to Cancel Its Assignments and Cancel Its Licenses (filed Mar. 29, 2007) (Reply).

<sup>21</sup> 47 U.S.C. § 316.

<sup>22</sup> See Reply at 3.

<sup>23</sup> See Response to Opposition, Cross Motion and Request to Initiate Modification Proceedings (filed Apr. 11, 2007) (Response).

<sup>24</sup> See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia), *Memorandum Opinion and Order*, 16 FCC Rcd 19857, 19857 n.1 (2001) (granting request to treat pleading captioned petition for reconsideration as application for review); WPBN/WTOM License Subsidiary, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 1838, 1838 n.1 (2000) (same); Texas Media Group, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 2851, 2851 n.1 (1990) (same).

<sup>25</sup> See Charles T. Crawford, *Memorandum Opinion and Order*, 17 FCC Rcd 19328, 19330 ¶ 6 (2002) (*Crawford*) (“Finally, we dismiss Kay’s informal request that seeks to modify the authorizations for the captioned authorizations. We are not obligated to consider such pleadings. In the instant case, as a matter of our discretion, we decline to consider Kay’s informal request because we believe it would be an inefficient use of our resources to consider the request, which merely reiterates arguments contained in his AFR. Therefore, to the extent Kay’s pleading informally requests that we modify the licenses in question, we dismiss that request.”) (footnotes omitted), *recon. dismissed, Order*, 18 FCC Rcd 10475 (WTB PSPWD 2003).

<sup>26</sup> See Response at 6; see also *Crawford*, 17 FCC Rcd at 19330 n.22.

based on relevant information regarding business dealings between NSTN and NRMCM, that NRMCM discontinued operation of its licensed facilities.<sup>27</sup> NSTN argues that this information renders immaterial the issue of whether its monitoring was sufficient to demonstrate permanent discontinuance of operations.<sup>28</sup> We disagree.

9. NSTN does not specifically challenge – or even acknowledge – the decision to exclude the evidence regarding business dealings between the parties first proffered in NSTN’s response to MRA’s erratum. We agree with the Division’s suggestion that PSCID was within its discretion to decline to consider new facts at that stage of the informal proceeding.<sup>29</sup> Even if the response to the erratum were treated as a formal reply to MRA’s erratum, it would have been defective because it was not “limited to matters raised” in the erratum.<sup>30</sup> The erratum simply offered documentation that had been omitted from MRA’s opposition. It was not an opportunity for NSTN to offer new evidence regarding other matters.

10. We further conclude that the *Order* and *Order on Reconsideration* correctly found that the evidence of discontinuance properly presented to the Bureau failed to substantiate NSTN’s allegation that NRMCM’s licenses cancelled automatically. Like a petition to deny, an informal objection “must contain specific allegations of fact sufficient to make a prima facie showing that ... a grant of the application would be inconsistent with the public interest, convenience and necessity.”<sup>31</sup> NSTN’s petition failed to meet this standard. The only factual allegation made in the petition to show that the subject station had discontinued operation was the allegation that NRMCM “has been our customer, paying us \$960.00 per month to operate under the Private Carrier license of National Science & Technology Network Inc. Call Sign WPPZ334 for more than 4 years.”<sup>32</sup> Accepting the truth of that allegation, we do not agree with NSTN’s argument that NRMCM’s use of NSTN’s facilities as a paying customer proves that NRMCM discontinued operations at its own station. Rather, as noted in the *Order*, “[i]t is plausible that the licensee would use the other station’s facilities to augment its own operations, as MRA asserts is the case here.”<sup>33</sup>

11. Nor was NSTN’s evidence of monitoring sufficient. We agree with NSTN that permanent discontinuance of station operations can be substantiated without submitting detailed monitoring studies. To the extent that the Division’s language can be construed to suggest that detailed monitoring studies are an essential component of a successful claim that a license cancelled automatically pursuant to Section 90.157, we believe that this overstates the case.<sup>34</sup> Certainly, there are circumstances where monitoring studies are unnecessary, such as an undisputed statement from the site owner/manager

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<sup>27</sup> See AFR at 1.

<sup>28</sup> *Id.*

<sup>29</sup> Similarly, we decline to consider the “newly discovered evidence” submitted with NSTN’s reply to MRA’s opposition to its application for review. See Reply at 3, Ex. C. The information relates to events in 2002 and earlier, and NSTN offers no explanation why it could not have been submitted sooner. Moreover, an application for review may not rely on questions of law or fact upon which the designated authority was afforded no opportunity to pass. See 47 C.F.R. § 1.115(c).

<sup>30</sup> See 47 C.F.R. § 1.45(c).

<sup>31</sup> See 47 C.F.R. § 1.939(d); Area Christian Television, Inc., *Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P&F) 862, 864 (1986).

<sup>32</sup> The entire petition to deny was reproduced in a footnote in the *Order on Reconsideration*. See *Order on Reconsideration*, 21 FCC Rcd at 3771 n.26.

<sup>33</sup> See *Order*, 21 FCC Rcd at 5153 ¶ 5.

<sup>34</sup> We do not believe that this was the Division’s intent, for the Division specifically stated that the monitoring requirement applies only “absent[t] unusual circumstances,” see *Order on Reconsideration*, 22 FCC Rcd at 3771 ¶ 7, such as those discussed *infra*.

that the putative licensee no longer maintains a transmitter at the authorized site, or persuasive evidence that the licensee no longer exists, or an admission by the licensee that the facility ceased operating.<sup>35</sup> Absent such evidence, however, a claim of permanent discontinuance of operations that relies materially on the complainant's contention that the licensee has not been heard on the authorized frequencies must, under Commission precedent,<sup>36</sup> be supported by continuous monitoring.<sup>37</sup> Because the present matter does not present such circumstances, we agree with the Division that NSTN's monitoring fell short of what is required to demonstrate discontinuance of operation.

12. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the petition for reconsideration filed by National Science and Technology Network, Inc. on February 28, 2007, when treated as an application for review, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

<sup>35</sup> See, e.g., Glendale Electronics, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 2540, 2542-43 ¶ 8 (2004) (entity that agreed to acquire station in 1994 decided to let license expire rather than file assignment application, but assignor's subsequently-appointed conservator, unaware of the agreement, renewed the license; Commission concluded that license cancelled automatically in 1995), *recon. dismissed, Order on Reconsideration*, 20 FCC Rcd 4238 (WTB MD 2005); Veracon, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 4287, 4287-88 ¶ 2 (2001) (affidavit that complainant inspected licensee's site and found no equipment operating on licensed frequency, and by monitoring observed that licensee operated on a different frequency authorized under another license); Mobile U.H.F., Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 3286, 3287 ¶ 4 (2000) (licensee removed equipment and commenced operating on a different frequency licensed to a community repeater), *recon. dismissed, Order*, 15 FCC Rcd 12844 (WTB PSPWD 2000); West Coast Cab Company, *Memorandum Opinion and Order*, 15 FCC Rcd 5909, 5910 ¶¶ 3-4 (2000) (site manager stated that transmitter had been disconnected for over a year for failure to pay site rental fee, and Commission correspondence to licensee was returned unclaimed); Milton H. Pintell, *Order on Reconsideration*, 20 FCC Rcd 19315, 19316 ¶ 3 (WTB PSCID 2005) (declarations that complainant's personnel visited the authorized site "and were told by the building's security chief that there were no antennas on the roof").

<sup>36</sup> See note 14, *supra*.

<sup>37</sup> See, e.g., Elmont Trans Med Corporation, *Order*, 18 FCC Rcd 18692, 18694-95 ¶ 9 (WTB PSPWD 2003).